# Majlis Perbandaran Melaka Bandaraya Bersejarah v First Consolidated Sdn Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO M-03-34 OF 1995
DENIS ONG, MOHD SAARI, AZMEL JJCA
29 AUGUST 2002

***Civil Procedure*** *— Attachment — Garnishee order made absolute — Respondent's application for order made absolute was granted — Whether appellant (garnishee) still owed money to judgment debtor — Whether trial judge misdirected himself in not considering exhibits tendered*

The respondent had obtained an order for a judgment sum of RM493,227.80 against Padu Ehsan Sdn Bhd ('PESB'). The judgment was not satisfied to the extent of RM153,448.02. Later, the respondent came to know that PESB was the earthwork contractor for the appellant (garnishee). Pursuant to the contract between the appellant and PESB, it was alleged that the appellant still owed money to PESB. The respondent applied to the senior assistant registrar ('SAR') for a garnishment order nisi under O 49 r 1(1) of the Rules of the High Court 1980 ('the RHC') to be made absolute which the learned SAR refused to grant. On appeal to the judge in chambers, the learned judge allowed the appeal and granted the order to be made absolute. This appeal was against that order. The issue for determination was whether the first and second interim payments had been disbursed to PESB by the appellant.

**Held**, allowing the appeal with costs:

The learned judge had misdirected himself in not considering exhs P3 and P6 and the endorsements of the two cheques (exhs P10 and P11). Had the learned judge considered the endorsements of the two cheques together with the contemporaneous documents, he would have reached a different conclusion. Upon a perusal of exhs P3, P6, P10 and P11, the court was satisfied that the first and second interim payments totalling RM714,900 were in fact disbursed to PESB. As such, it could not be said that the appellant owed RM714,900 to PESB (see p 203A–B).

**[Bahasa Malaysia summary**

Responden telah memperolehi perintah untuk jumlah penghakiman sebanyak RM493,227.80 terhadap Padu Ehsan Sdn Bhd ('PESB'). Penghakiman tersebut tidak terlaksana sebanyak RM153,448.02. Setelah itu, responden mendapat tahu bahawa PESB merupakan kontraktor kerja-kerja tanah untuk perayu (yang digarnis). Menurut perjanjian di antara perayu dan PESB, telah dikatakan bahawa perayu masih berhutang kepada PESB. Responden telah memohon kepada penolong kanan pendaftar ('PKP') untuk suatu perintah garnisan nisi

di bawah A 49 k 1(1) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') untuk dimutlakkan, di mana ia telah ditolak oleh PKP. Dalam rayuan kepada hakim dalam kamar, hakim yang arif telah membenarkan rayuan tersebut dan mengarah supaya perintah tersebut dimutlakkan. Rayuan ini adalah terhadap perintah itu. Isu untuk ditentukan adalah sama ada bayaran-bayaran interim pertama dan kedua telah dibayar kepada PESB oleh perayu.

**Diputuskan**, membenarkan rayuan tersebut dengan kos:

Hakim yang arif telah salah arahkan dirinya sendiri dengan tidak menimbang eksh P3 dan P6 dan pengendorsan dua cek tersebut (eksh P10 dan P11). Jikalau hakim tersebut telah menimbang pengendorsan dua cek tersebut bersama dengan dokumen-dokumen semasa, beliau akan membuat keputusan yang lain. Setelah meneliti eksh P3, P6, P10 dan P11, mahkamah berpuas hati bahawa bayaran-bayaran interim pertama dan kedua berjumlah RM714,900 telahpun dibayar kepada PESB. Oleh itu, tidak boleh dikatakan bahawa perayu berhutang kepada PESB sebanyak RM714,900 (lihat ms 203A–B).

**Notes**

For cases on garnishee order made absolute, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1361-1362

**Legislation referred to**

Rules of the High Court 1980 O 49 r 1(1)

**Appeal from:** Civil Suit No 22–113 of 1992 (High Court, Melaka)

*Adillah Ahmad Nordin* (*Ng Kong Peng* and *J Amardas* with her) (*Nordin & Phua*) for the appellant (garnishee).

*Yau Jiok Hua* (*Yau Jiok Hua & Co*) for the respondent.

**Mohd Saari JCA** (delivering judgment of the court): In the court below, the learned SAR who heard the application for a garnishment order nisi under O 49 r 1(1) of the Rules of the High Court 1980 refused to grant the order to be made absolute. On appeal to the judge in chambers, the learned judge allowed the appeal and granted the order to be made absolute. Against the order, the appellant (garnishee) appealed.

Prior to the application for such a garnishment order, the respondent (JC) obtained an order for a judgment sum of RM493,227.80 against Padu Ehsan Sdn Bhd ('PESB') in the High Court at Johor Bahru (vide Civil Suit No 22–114–1992). The judgment was not satisfied to the extent of RM153,448.02. Later, the respondent came to know that PESB was the earthwork contractor for the appellant (garnishee). Pursuant to the contract between the appellant and PESB, it was alleged that the appellant still owed money to PESB.

A At the initial stage of the hearing of this appeal, the parties agreed that (exh P7) p 230 and (exh P6) p 234 form part of the appeal record. They also agreed that pp 231–233 and pp 235–243 of the appeal record be expunged.

The dispute is over first and second interim payments. The issue for B determination is whether the first interim payment of RM530,200 and the second interim payment of RM184,700 had been disbursed to PESB.

The facts from the appeal record as narrated by Mr Ng (the learned counsel for the appellant) was that the present case involved four interim payments, namely:

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| First payment | RM530,200 |
| Second payment | RM184,700 |
| Third payment | RM696,000 |
| D Fourth payment | RM300,000 |

The respondent (JC) did not dispute that payments nos 3 and 4 had been made. The dispute was in respect of payments nos 1 and 2. The appellant's (garnishee's) case was that payments nos 1 and 2 totaling RM714,900 had E been fully disbursed to PESB.

The court's attention was drawn to a number of documents. For the purpose of this appeal, we need only to mention certificate of interim payment no 3 (exh P6) at p 234 of the appeal record, Bank Negara cheque for RM530,200 (exh P10) at p 305 of the appeal record, Bank Negara cheque for RM184,700 (exh P11) at p 312 of the appeal record and the F statement of final account (exh P3) at pp 291–293.

In the case of the certificate of interim payment (exh P6), PESB acknowledged having received the sum of RM696,000. In the same document, the words 'Bayaran Interim Terdahulu' RM714,900 were inserted therein, implying that said amount was disbursed to PESB. G RM714,900 was the total amount of first and second interim payments.

The disbursement of RM714,900 is supported by the evidence of the two cheques (exh P10 and exh P11) which bear the endorsement of Bank of Commerce (M) Bhd. PESB's account with Bank of Commerce is no 04010550739007. The account number of PESB on the cheques and vouchers tally.

H The appellant's case is further reinforced by the evidence of the statement of final account (exh P3). In that statement, at p 293 of appeal record, one Kuan Ee Leong, director of PESB, acknowledged receipt of the interim payments (nos 1 to 4) amounting to RM1,710,900 which amount would have included payments nos 1 and 2 totalling RM714,900. In the I same statement, at p 293 of appeal record, the following words appear:

> Saya/Kami* yang menandatangani di bawah ini mengaku penerimaan Perakuan Muktamad di atas dan setelah meneliti butir-butir terkandung di

dalamnya, bersetuju dengan Bayaran Muktamad Disyorkan Kena Dibayar dan mengaku bahawa Saya/Kami* tidak ada tuntutan lanjut di bawah kontrak ini.

| | |
|---|---|
| t.t. | t.t. |
| ..... | ..... |
| Tandatangan Saksi | Tandatangan Kontraktor |
| Nama Penuh: MD NOR BIN AB HAMID | Nama Penuh: KUAN EE LEONG |
| No K/P: 7267060 | No K/P: 4866046 |
| Alamat: SSB-1 Batu $2^1/_2$ | PADU EHSAN SDN BHD |
| Bukit Baru Dalam | 391-N, (1st FLOOR), JALAN MAWAR |
| Melaka | TAMAN PERINGGIT JAYA, |
| | 75400 MELAKA |
| | TEL NO: 06-247927 |
| | FAX/TEL NO: 06-247968 |
| | ..... |
| | Cap Kontraktor |
| Tarikh: 6 OKT 1993 | Tarikh: 6 OKT 1993 |

Mr Yau, counsel for the respondent (JC), argued that there was no evidence that the amounts as stated in exhs P10 and P11 were credited into the account of PESB. Only endorsements appeared on the two cheques and anybody could have put the endorsements there.

In the judgment of the learned judge in the court below, his Lordship, at p 042 of the appeal record, said:

> I could only conclude from all the available facts that P10 and P11 never left the Jabatan Akauntan Negara's office and that no payments thus had been made to the judgment debtor. The unblemished and spotless cheques which caused the court to be even more suspicious of the assertion of PW3 could only support my findings that the garnishee still owed the judgment debtor to the tune of RM714,900.

The appellant argued that the learned judge in the court below failed to consider the endorsement by Bank of Commerce on the two cheques (exhs P10 and P11). His Lordship's observation about it was that both the cheques were unblemished, which as conceded by the respondent was not correct. Further, in his judgment, the trial judge made no reference to exh

P3 and exh P6. In this regard, we agree with the appellant that the learned judge misdirected himself in not considering exh P3 and exh P6 and the endorsements on the two cheques (exhs P10 and P11). Had the learned judge considered the endorsements on the two cheques together with the contemporaneous documents (exhs P3 and P6), he would have reached a different conclusion.

In conclusion, upon a perusal of contemporaneous documents (exhs P3, P6, P10 and P11) in totality, we are satisfied that first and second payments totaling RM714,900 were in fact disbursed to PESB. As such it could not be said that the appellant owed RM714,900 to PESB. In the premises, we allowed the appeal with costs here and below, set aside the order of the learned trial judge and further ordered that the deposit be refunded to the appellant.

*Appeal allowed with costs.*

Reported by Zahid Taib